IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 241 of 1991

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA Sd/-
and
HON'BLE MS.JUSTICE H.N.DEVANI Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

COMMISSIONER OF INCOME-TAX

Versus

S. C. SHAH & OTHERS

Appearance:

1. INCOME TAX REFERENCE No. 241 of 1991
MR MANISH R BHATT for Petitioner No. 1
SERVED BY RPAD - (N) for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

Date of decision: 09/12/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1. The Income Tax Appellate Tribunal, Ahmedabad Bench has referred the following two questions under Section 256(1) of the Income Tax Act, 1961 (the Act) at the instance of the Commissioner Income Tax, Gujarat-III, Ahmedabad.

"1. "Whether, the Appellate Tribunal is right in law in setting aside the order made by the Commissioner of Income-tax under Section 263 of the Income-tax Act, 1961?"

2. Whether, the Appellate Tribunal is right in law in holding that the assessee should be assessed in the status of body of individuals ?"

2. The Assessment Year is 1982-83 and the relevant accounting period is the year ended on 30-06-1981. The assessee filed its return of income in the status of Body of Individuals (BOI) and the Assessing Officer accepted the same while framing assessment under Section 143(3) on 29-02-1984. The Commissioner of Income Tax initiated revisional proceedings under Section 263 of the Act after issuing show cause notice to the assessee. The Commissioner did not accept the explanation tendered by the assessee and set aside the assessment order directing the Assessing Officer to adopt the status of the assessee as that of Association of Persons (AOP) and levy tax in accordance with law vide his order dated 27-03-1986.

3. The assessee challenged the order of the CIT made under Section 263 of the Act by way of an appeal before the Tribunal who, for the reasons stated in its order dated 21-06-1988, held that the CIT was in error in exercising jurisdiction under Section 263 of the Act and that the assessee was liable to be assessed in the status of BOI. The Tribunal for the purpose of upholding the contention of the assessee regarding its status relied on decision of this Court in the case of Commissioner of Income-tax, Gujarat III Vs. Harivadan Tribhovandas, (1977) 106 ITR 494.

4. Mr.B.B.Naik, learned Standing Counsel appearing on behalf of the applicant - revenue, submitted that the Tribunal had erred in accepting the stand of the assessee. That as per declaration of the donor executed on 21-06-1981 the donees were only entitled to distribute amongst themselves the gifted property. The moment the donees came together to earn income from the gifted

amount their action gave rise to a situation whereunder they were required to be assessed under the Act in the status of AOP. He, therefore, urged that the order of the Commissioner be upheld. In support of the submission reliance was placed on the decision in case of the Meera and Company Vs. Commissioner of Income-tax, (1997) 224 ITR 635 to contend that once there was an organised activity jointly carried on to produce income, it was a clear case of a joint business venture of a few individuals entitling the Revenue to assess the said person in the status of AOP.

5. Though served there is no appearance on behalf of the respondent - assessee.

6. The Commissioner can exercise jurisdiction under Section 263 of the Act provided the two prerequisite conditions stand satisfied - viz. (i) the order of the Assessing Officer sought to be revised is erroneous; (ii) it is prejudicial to the interests of the Revenue. If one of them is absent - i.e. if the order of the Assessing Officer is erroneous but is not prejudicial to the Revenue, or if it is not erroneous but is prejudicial to the Revenue - recourse cannot be had to Section 263 of the Act. The provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer. These are the observations made by the Hon'ble Apex Court in the case of Malabar Industrial Co. Ltd. Vs. Commissioner of Income Tax, (2000) 243 ITR 83. The Supreme Court further goes on to interpret the phrase "prejudicial to the interests of the Revenue" and states that when an Income Tax Officer adopted one of the courses permissible in law or where two views are possible and the Income Tax Officer has taken one view with which the Commissioner does not agree, the Assessment Order cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Assessing Officer is unsustainable in law.

7. Applying the aforesaid tests, it is apparent that in the facts of the present case, it is not possible to state that the view adopted by the Assessing Officer is unsustainable in law in light of the decision of the Apex Court in the case of Meera and Company (supra). In case of Meera and Company (supra) the Apex Court was called upon to decide as to what would be the correct status of the assessee, whether BOI or AOP. One individual expired intestate living behind mother, widow and minor children. They inherited the business carried on by the deceased individual. After the mother relinquished her share the

widow continued the business but claimed that the income was liable to be assessed in hands of the widow and the three minor children in equal shares. The department did not accept the contention and assessed in the status of BOI. When the matter was carried upto the Apex Court it was held that "It did not make any difference that the widow and the minor sons did not start the business. The business was inherited. But the fact that the business has been continued by the widow on her own behalf as well as on behalf of the minor sons after buying the interest of the mother goes to show that there is an organised activity jointly carried on to produce income. It is a clear case of a joint business venture of a few individuals. The income of this business has been rightly assessed in the status of a "body of individuals." The Apex Court stated that an AOP is not something distinct and separate from body of individuals. That the phrase "body of individuals" was brought on the statute book in 1961 Act to obviate any controversy as to whether only combinations of human beings are to be treated as a unit of assessment, i.e. whether the combinations should be only of individuals and individuals, and that combinations of non-individuals or combinations of individuals and non-individuals would not fall within other categories enumerated in Section 2(31) of the Act.

8. In the present case, as can be seen from the facts on record, three individuals were jointly donated a sum by the donor under a declaration dated 21-06-1981. The said sum was invested by them and interest income returned in the status of BOI. Thus, the facts are similar to the situation which was prevalent before the Apex Court in the case of Meera and Company (supra). Applying the said ratio it is apparent that the Tribunal has correctly held the status of the assessee to be BOI.

9. In the result, question No.1, referred to the Court, is answered in the affirmative i.e. in favour of the assessee and against the Revenue. Similarly, question No.2 is also answered in the affirmative i.e. in favour of the assessee and against the Revenue. The Reference stands disposed of accordingly. There shall be no order as to costs.

Sd/- Sd/-

[D.A.MEHTA,J] [H.N.DEVANI,J]

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